Court of Appeals, State of Michigan

ORDER

Birdie Procter v Consumers Energy Company

Docket No. 250178

LC No. 01-000604-CZ

Michael R. Smolenski
Presiding Judge

Henry William Saad

Richard A. Bandstra
Judges

On the Court's own motion, the per curiam opinion in the captioned matter issued on January 25, 2005, contains a clerical error; that is, Kalamazoo Circuit Court was incorrectly named as the lower court and the opinion is hereby AMENDED to reflect that the lower court in the captioned matter is Kent Circuit Court. In all other respects, the opinion remains the same.

STATE OF MICHIGAN COURT OF APPEALS

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Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

BERDIE PROCTER, Plaintiff-Appellant,	UNPUBLISHED January 25, 2005
v	No. 250178 Kalamazoo Circuit Court
CONSUMERS ENERGY COMPANY, Defendant-Appellee.	LC No. 01-000604-CZ

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Plaintiff brought this action against defendant for (1) sexual harassment, (2) retaliation, and (3) intentional infliction of emotional distress (IIED). At the close of her proofs, the trial court granted defendant's motion for a directed verdict on plaintiff's first and third claims. The remaining retaliation claim was dismissed by the trial court at the close of defendant's proofs. Plaintiff appeals the trial court's grant of directed verdicts to defendant, and we affirm.

I

Plaintiff began work for defendant in November 1996, in a three-person crew that maintained and repaired overhead and underground electrical wires. She complains of one instance of sexual harassment by a co-worker that took place in February 1997. She waited several weeks to report this incident to management. Management thereafter began an immediate investigation, and though the investigation proved inconclusive, management ensured that she and her alleged harasser were assigned to separate crews.

Plaintiff alleged that shortly after this incident, her coworkers engaged in a pattern of retaliatory behavior. The alleged conduct was not sexual, but included name-calling, verbal threats, rudeness, and offensive physical contact such as hose spraying. In June 1998, two of plaintiff's crewmates, about whom she never complained regarding any misconduct, alleged that she had picked up a hot wire in violation of safety rules.[1] Accordingly, on June 8, 1998, plaintiff

[1] Plaintiff's coworkers accused plaintiff of picking up a hot wire during work to restore service after a storm – this act constitutes a serious safety violation.

was called in for a safety investigation, and she denied any wrongdoing. Thereafter, she allegedly became distraught and left work that day, and remained off the job for several months on medical leave. She was terminated effective February 4, 1999, when she did not cooperate with defendant's investigation into her leave status after defendant discovered that she was working full-time elsewhere while collecting benefits from defendant due to her alleged inability to work.[2] She filed this action on January 18, 2001, nearly four years after the alleged February 1997 sexual harassment incident.[3]

II

Plaintiff asserts that the trial court erred when it ruled that the statute of limitations bars plaintiff's retaliation claim.[4] Plaintiff relies upon a continuing violation theory as articulated in *Sumner v Goodyear*, 427 Mich 505; 398 NW2d 368 (1986), for the proposition that the statute of limitations was tolled. Plaintiff must allege a series of discriminatory acts so sufficiently related as to constitute a pattern with at least one act falling within the limitation period. *Sumner*, *supra* at 538-539. "[T]he mere existence of some vague or undefined relationship between the timely and untimely acts is an insufficient basis upon which to find a continuing violation." *Id.* at 538.

We conclude that the trial court correctly granted a directed verdict of plaintiff's retaliation claim. An employer's failure to stop harassment by co-workers in retaliation for an employee's opposition to a civil rights violation can constitute adverse employment action. *Meyer v City of Center Line*, 242 Mich App 560, 572; 619 NW2d 182 (2000). However, plaintiff presented no evidence that her complaints or management's inaction happened during the limitations period. According to the trial court:

> I have this general statement by the plaintiff that she complained a hundred times to [management] about these ongoing problems. But for the life of me, to determine the timing of those complaints seems to me an exercise in sheer speculation . . . . the issue is when the complaints, if they were made, were made to management, to the extent that they didn't appropriately react or respond to them. And I don't – I don't know . . . . I shouldn't have to speculate, a jury shouldn't have to speculate . . . since the burden is on the plaintiff.

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[2] At oral argument, defendant again maintained that plaintiff worked full-time for other employers while on medical leave, yet plaintiff, perhaps tellingly, has not denied these allegations.

[3] The period of limitations for her three personal injury claims is three years. MCL 600.5805(10).

[4] A party that agrees to a directed verdict at trial waives appellate review on that issue. *Kohn v Ford Motor Co*, 151 Mich App 300, 310; 390 NW2d 709 (1986). At trial, plaintiff's counsel stated: "I do not have a response to the first issue of the statute of limitations. It seems clear that with fifth grade mathematics, we can calculate that the complaint was filed more than three years after the [alleged sexual harassment]." Accordingly, we hold that plaintiff's waiver of her sexual harassment claim precludes appellate review, and plaintiff also conceded, at oral argument, that she waived this issue.

Because plaintiff did not produce any evidence at trial that any of these alleged acts of retaliation occurred within the limitation period, we hold that the trial court properly granted a directed verdict in defendant's favor with respect to plaintiff's retaliation claim.[5]

IV

Plaintiff also says that the trial court erroneously dismissed plaintiff's IIED claim.[6] The elements for IIED are (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Roberts, supra* at 602.

Viewing the evidence in the light most favorable to plaintiff, we conclude that the trial court correctly ruled that plaintiff failed to establish her claim under *Roberts*. Moreover, the record lacks any evidence of defendant's intent or recklessness. Accordingly, we hold that the trial court did not err when it granted a directed verdict dismissing plaintiff's IIED claim.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra

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[5] Plaintiff's co-workers accused plaintiff of picking up a hot wire during work to restore service after a storm – this act constitutes a serious safety violation. Plaintiff alleges that this accusation was fabricated because of her report of sexual harassment over a year earlier. Though this event did occur within the limitation period, plaintiff did not show that defendant shared a retaliatory intent. Furthermore, by leaving work and not participating in defendant's safety investigation, plaintiff denied defendant the ability to properly respond to any alleged discrimination. Also, there is no evidence that defendant knew that plaintiff speculated that the co-workers' safety concerns were connected to plaintiff's report of sexual harassment.

[6] We note that our Supreme Court has not adopted IIED as an independent tort action. Instead, the Court has held, in specific cases, that the plaintiffs had not met the elements of IIED even if such a cause of action exists. See, e.g., *Roberts v Auto-Owners Ins Co*, 422 Mich 594; 374 NW2d 905 (1985).